

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

February 11, 2010

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Hawaii

After-the-Fact Consent to Mortgage, Grant of Easement No. S-4553, Hotels In Paradise, Inc., Grantee, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/ 2-2-31: por. for landscape easement and Road Lots A and B adjacent to parcel 12

After-the-Fact Consent to Assignment of Grant of Easement No. S-4553 from Richard Emery, Commissioner, to Owens Mortgage Investment Fund, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/ 2-2-31: por. for landscape easement and Road Lots A and B adjacent to parcel 12

APPLICANTS AND REQUESTS:

Hotels In Paradise, Inc., a Hawaii corporation, requesting consent to mortgage from Owens Financial Group, Inc., a California corporation, Mortgagee, in the amount of \$1,500,000.

Richard Emery, Commissioner, as Assignor, requesting consent to assignment to Owens Mortgage Investment Fund, a California limited partnership, as Assignee.

LEGAL REFERENCE:

Sections 171-22 and 171-36(a)(5), Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Waiakea situated at Waiakea, South Hilo, Hawaii, identified by Tax Map Key: 3rd/ 2-2-31: por. for landscaping easement and Road Lots A and B adjacent to parcel 12, as shown on the attached maps labeled Exhibits A, B and C.

ZONING / AREA / SMA:

Parcel TMK (3) 2-2-31: por.	LUC	Zoning	Area	SMA
Landscape easement	Conservation	N/A	0.58 acre	Yes
Road Lot A	Urban	N/A	23,800 sq. ft.	Yes
Road Lot B	Conservation	N/A	800 sq. ft.	Yes

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CURRENT USE STATUS:

Grant of Easement No. S-4553 is currently used for access, utility and landscape purposes.

CHARACTER OF USE:

Right, privilege and authority to construct, use, maintain and repair non-exclusive easements over, under and across State-owned land for roadway, utility, and landscaping purposes.

EASEMENT TERM:

Sixty-five (65) years, commencing on October 7, 1976 and expiring October 6, 2041. There are no rental reopenings; consideration was paid on a one-time, lump sum basis upon grant of easement.

ANNUAL RENTAL:

Not applicable.

USE OF LOAN PROCEEDS:

Hotels in Paradise, Inc. used the loan proceeds to refinance existing debt on its private properties serviced by the subject easement.

CONSIDERATION:

Assignee Owens Mortgage Investment Fund acquired a partial interest in the subject easement at a foreclosure sale of a private parcel designated as Tax Map Key: (3) 2-2-

30:18. Assignee paid \$1,529,054.17 for the private parcel at a public auction. No specific allocation was made for the value of the easement rights.

RECOMMENDED PREMIUM:

Not applicable as the easement instrument does not allow for a premium.

DCCA VERIFICATION:

Assignor Richard Emery, Commissioner, is a natural person and not required to register with the DCCA.

Assignee Owens Mortgage Investment Fund:

Place of business registration confirmed:	YES <u>X</u>	NO <u> </u>
Registered business name confirmed:	YES <u>X</u>	NO <u> </u>
Good standing confirmed:	YES <u>X</u>	NO <u> </u>

REMARKS:

Applicants Owens Financial Group, Inc. (Owens Financial) and Owens Mortgage Investment Fund (Owens Mortgage) have requested after-the-fact approvals of two transactions relating to the subject easement. The first transaction is a mortgage of the easement to Owens Financial in 2000, and the second is the assignment of the easement to Owens Mortgage in 2008 through a foreclosure of the mortgage. Staff reviews the relevant history below.

At its meetings of November 12, 1971, Item F-13, November 17, 1972, Item F-7, and September 14, 1973, Item F-4, the Board of Land and Natural Resources approved the sale at public auction of a non-exclusive, 65-year term easement for several purposes over portions of State land situated at Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-2-31. The easements were needed for the development of the Waiakea Village Hotel on two private parcels designated as Tax Map Keys: (3) 2-2-30:03 (Parcel 3) and 2-2-30:18 (Parcel 18). The successful bidder at auction was Waiakea Corporation, one of the entities involved in the development of the hotel and its related commercial facilities.

Grant of Easement No. S-4553 was issued to Waiakea Corporation effective as of October 7, 1976. The grant covered three separate easement rights over portions of Tax Map Key: (3) 2-2-31: (i) easements over Road Lots A and B for access and utility purposes; (ii) a landscape easement; and (iii) Easements G, H and J for sewer purposes. Shortly thereafter, at its meeting of November 12, 1976, Item F-6, the Board approved a partial assignment of Grant of Easement No. S-4553, relating to the sewer easements only, to the County of Hawaii. The assignment was prepared and dated as of August 5, 1977. As a result, the sewer easements are not at issue in Applicants' assignment request.

Maps showing Parcels 3 and 18, the access and utility easements over Road Lots A and B, and the landscape easement are attached Exhibits A, B and C.

Over the years, the Waiakea Village Hotel ceased to operate as a hotel. In 1984, the residential portion of the hotel located on Parcel 3 was converted to a horizontal property regime, now referred to as a condominium property regime (CPR), known as Waiakea Villas (Villas CPR). The condominium project consists of 12 buildings, 301 condominium units, as well as common areas and other real property interests. The commercial buildings of the former hotel located on Parcel 18 were not included in the CPR. Rather, the commercial buildings continued to be operated as various retail shops, restaurants and offices, commonly known as Waiakea Village. See Exhibit A.

Through a series of mesne conveyances with Board approval, the road, utility and landscape rights under Grant of Easement No. S-4553 were acquired by Shanghai Investment Company, Inc. (Shanghai) pursuant to a Special Warranty Deed executed March 29, 1993. The Board approved an after-the-fact request for assignment of the easement to Shanghai at its meeting of January 13, 1996, Item F-1-d, and the Chairperson executed the consent instrument on February 26, 1996.

Subsequently, by Warranty Deed dated June 27, 1997, Shanghai conveyed Parcel 3 (containing the Villas CPR) to Waiakea Villas, LLC (WVL), together with rights in Grant of Easement No. S-4553. The Board approved an after-the-fact request for this partial assignment of the easement to WVL at its meeting of August 8, 1997, Item D-41, and the Chairperson executed the consent instrument on June 19, 1998. Shanghai retained ownership of the Waiakea Village on Parcel 18. Accordingly, Shanghai and WVL shared the easement rights under Grant of Easement No. S-4553 after the 1997 conveyance of Parcel 3.

On January 3, 2000, Shanghai changed its name to Hotels In Paradise, Inc. (HIPI), as reflected in DCCA records. By instrument dated February 15, 2000, HIPI granted the subject mortgage in favor of Owens Financial in the amount of \$1,500,000. HIPI and Owens Financial did not obtain Board consent to the mortgage. On July 5, 2000, Owens Financial assigned the mortgage to Owens Mortgage. HIPI defaulted on the mortgage and in 2007 Owens Mortgage commenced a foreclosure action in the First Circuit Court against HIPI and others under Civil No. 07-1-0831-05. The court ordered judgment in favor of Owens Mortgage, and a decree of foreclosure appointed Richard Emery as Commissioner.

Commissioner Emery sold Parcel 18, including HIPI's interest in Grant of Easement No. S-4553, at public auction with Owens Mortgage as the successful bidder. The court approved and confirmed the sale by order entered in the foreclosure action on June 26, 2008. On July 29, 2008, Commissioner Emery executed a Commissioner's Deed covering Parcel 18 and rights in Grant of Easement No. S-4553 in favor of Owens Mortgage. However, Owens Mortgage did not seek the Board's approval for this

conveyance.

On January 14, 2010, Commissioner Emery and Owens Mortgage executed a separate Assignment of Grant of Easement No. S-4553, which details and confirms the assignment of certain rights in the easement to Owens Mortgage.

Land Division files show that HIPI and WVL carried liability insurance as required under Grant of Easement No. S-4553 through August 1, 2008, but that the insurance lapsed thereafter. A notice of default issued to WVL, which remains uncured, but not to HIPI. Except for the lack of liability insurance from HIPI and WVL, staff believes there is compliance with requirements of Grant of Easement No. S-4553. Despite the outstanding liability insurance issue, staff is recommending approval of the mortgage and assignment consent requests because the assignee, Owens Mortgage, has provided a certificate of liability insurance for the easement naming the State as an additional insured, and is otherwise prepared to comply with the easement conditions.

The standard consent to assignment of easement form used by the Department of the Attorney General includes a residual liability clause that provides as follows:

Assignor hereby acknowledges that the Lessor's consent to assignment of the general lease, does not release the Assignor from any and all responsibilities, obligations, liabilities, and claims respecting or arising under or out of said general lease.

In the present situation, Commissioner Emery cannot make such an acknowledgment because he served as an officer of the court and did not hold any personal interest in the easement. Accordingly, staff requests that the Board direct the Department of the Attorney General to omit this clause from the consent to assignment instrument, and that Commissioner Emery not be required to execute the consent instrument.

Owens Mortgage has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions. There are no outstanding rental reopening issues.

RECOMMENDATION: That the Board:

- A. Consent to the mortgage between Hotels In Paradise, Inc., Mortgagor, and Owens Financial Group, Inc., Mortgagee, subject to the following:
 1. The standard terms and conditions of the most current consent to mortgage form, as may be amended from time to time;
 2. Review and approval by the Department of the Attorney General; and

3. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
- B. Consent to the assignment of Grant of Easement No. S-4553 from Richard Emery, Commissioner, as Assignor, to Owens Mortgage Investment Fund, as Assignee, subject to the following:
1. The following standard clause shall be omitted from the consent instrument:

Assignor hereby acknowledges that the Lessor's consent to assignment of the general lease, does not release the Assignor from any and all responsibilities, obligations, liabilities, and claims respecting or arising under or out of said general lease.
 2. Commissioner Richard Emery's signature shall not be required on the consent instrument;
 3. Except as provided above, the consent shall include the standard terms and conditions of the most current consent to assignment form, as may be amended from time to time;
 4. Review and approval by the Department of the Attorney General; and
 5. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Kevin E. Moore
District Land Agent

APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson

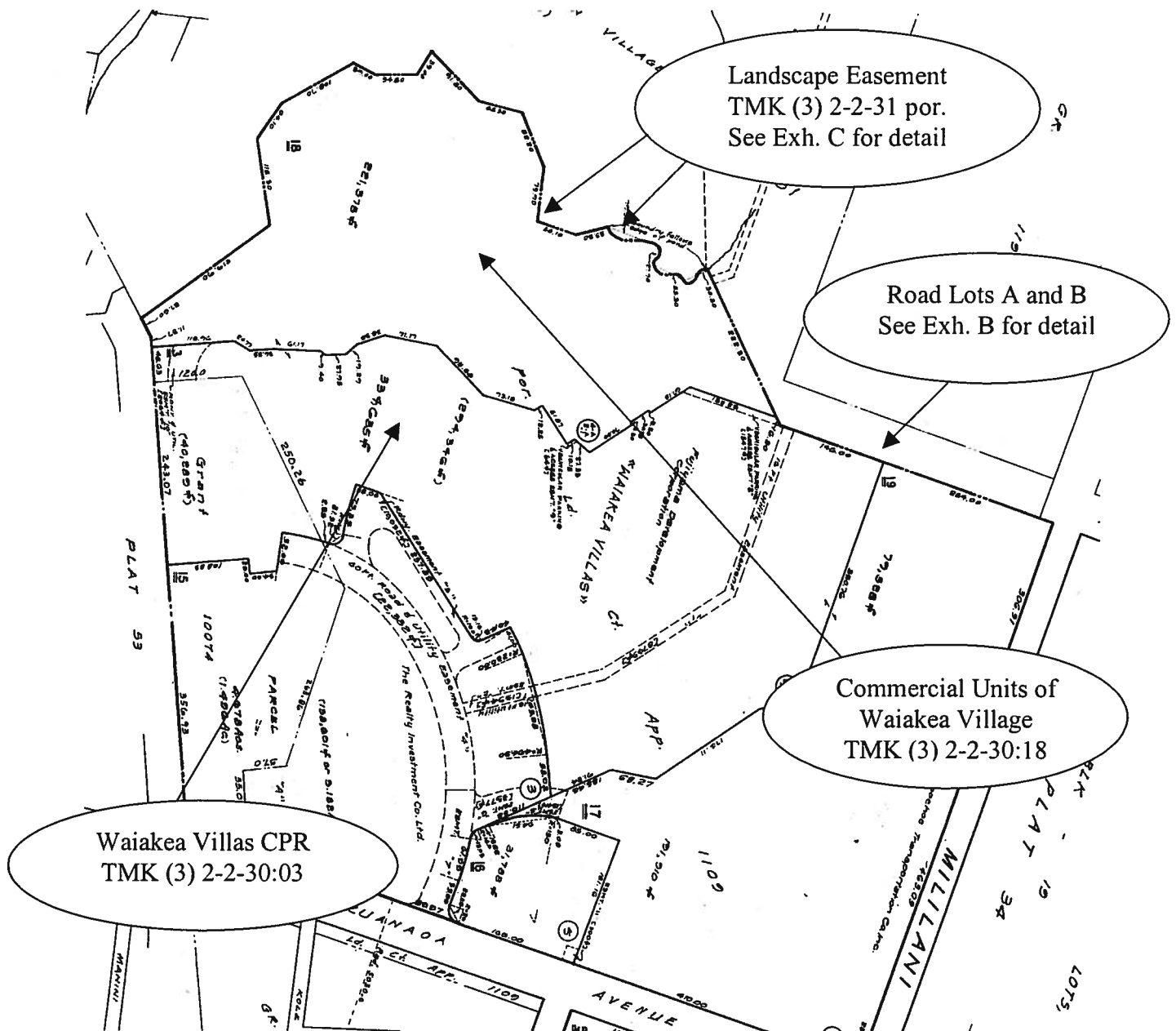


EXHIBIT A



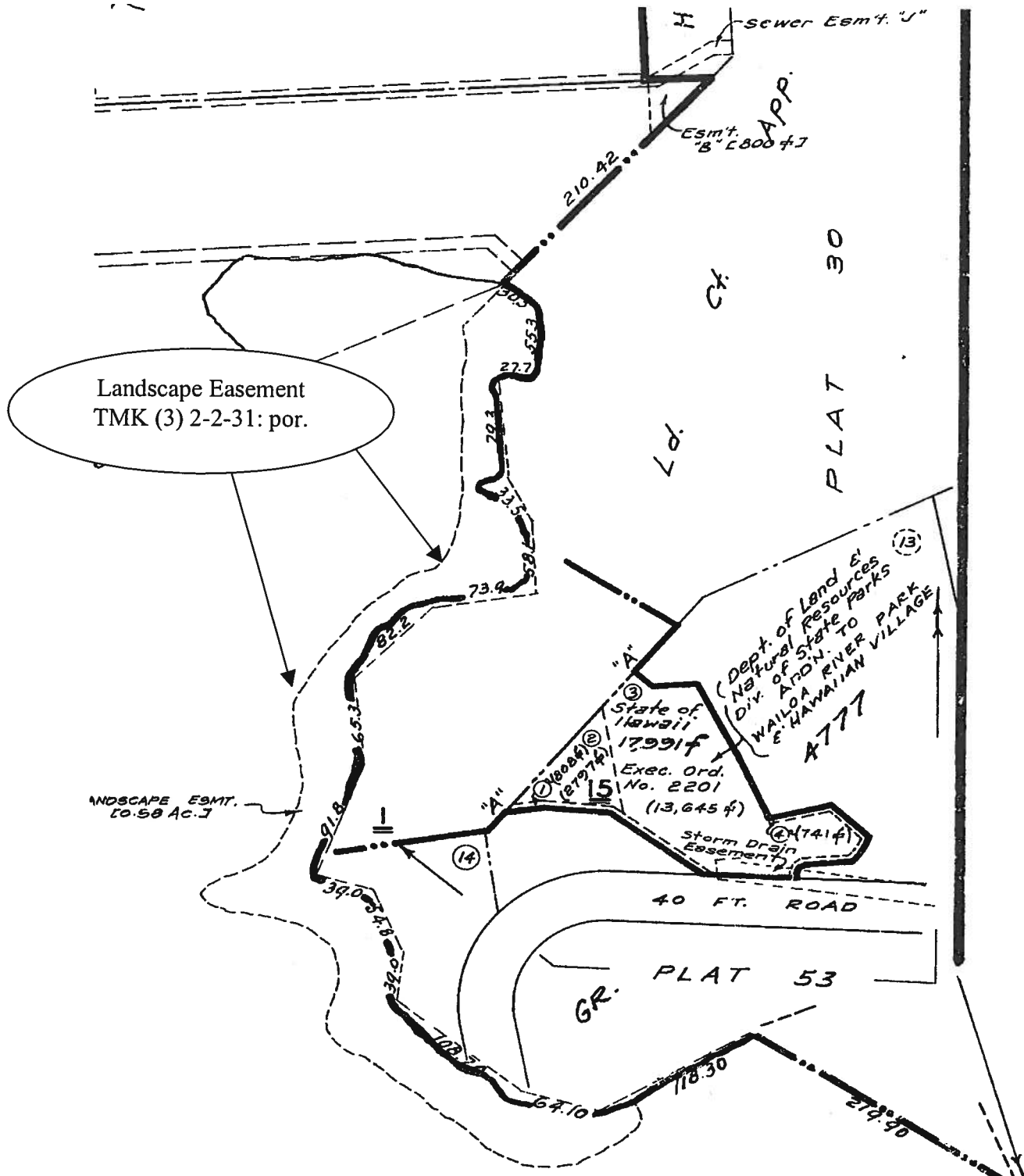


EXHIBIT C